As regards maintenance for the children, clause 5 of the deed reads:–

"The Wife shall be entitled to and solely responsible for absolute custody, control, education and maintenance of the children . . . . . during their minority."

In view of this clause the Appellant maintained that he was not responsible to provide maintenance for the children. In my opinion he cannot relieve himself of the responsibility of providing maintenance for the children merely by inserting the above clause in the agreement. The deed does not show that he paid a lump sum for the maintenance of the children for any period of time. Although he paid $50,000 to the Respondent under the deed, that was consideration for the dissolution of the marriage. There is no evidence to show that he had provided for the children some assets or investments from which income would be obtained and used for the maintenance of the children.

In her affidavit the Respondent alleged that the Appellant had not given maintenance since February 1981. In his evidence the Appellant stated:

"Since signing the agreement I have made contribution to their (the three children's) maintenance. P.W. 1 (i.e. the Respondent) asked for it and I gave her $300 per month. This $300 is voluntary payment since P.W. 1 said she does not have enough."

Apart from this the Appellant did not adduce further evidence to show that he had been paying $300 per month for the maintenance of the children. In the Appellant's affidavit in reply date June 10, 1982 no reference was made to this alleged payment of $300 per month. Evidence shows that the Respondent went to see the Welfare Officer on February 21, 1981 to complain about non-payment of maintenance. Therefore in my opinion it is fair to accept the Respondent's allegation that maintenance had not been given since February 1981. Considering the size of the business that the Appellant has been carrying on and his income from the business, in my opinion it is fair that he should pay maintenance of $100 per month per child. Therefore I order that the Magistrate's orders be substituted with an order that the Appellant should pay the Respondent $300 per month for the maintenance of the three children commencing from February 1981 until they reach their respective age of majority.

In addition to the Respondent's affidavit of complaint dated March 4, 1981 and the Appellant's affidavit in reply dated June 10, 1982, three other affidavits dated July 17, 1982, July 20, 1982 and July 26, 1982 are included in the record of appeal. These three affidavits were deposed to after the Magistrate had heard the case and given her decision on July 7, 1982. It appears that these three subsequent affidavits were filed in connection with an application for stay of execution pending appeal. At the hearing of this appeal no application was made to this Court to admit the three subsequent affidavits as additional evidence. Therefore for the purpose of this appeal the three subsequent affidavits should be disregarded.

Costs to the Appellant in respect of the appeal.

Order accordingly.

Solicitors: *K.C. Chai & Co.; Legal Aid Bureau.*

E.W. TALALLA v. NG YEE FONG & ANOR.

[O.C.J. (Wan Hamzah J.) September 7, 1984]
[Kuala Lumpur – Civil Suit No. 3079 of 1977]

Land Law – Encroachment of land – Action for order to remove part of house and septic tank – Whether action was time-barred – Limitation Ordinance 1953, s. 9(1) – National Land Code, ss. 282-284, 286 & 341.

Land Law – Easement – There must be express grant – Acquiescence not sufficient to create easement.

The plaintiff was the owner of land lot No. 179, Section 98, Kuala Lumpur Town, on which there was a house No. 11. The defendants were owners of land lot No. 126, Section 98, Kuala Lumpur Town, which was adjoining to the plaintiff's land lot. No. 179. A part of the defendant's house No. 75A encroached onto and was situated on the plaintiff's land.

The plaintiff brought an action against the defendants and asked for an order that the defendants should remove that part of that house No. 75A which had been erected on the plaintiff's land and that the defendants should also remove their septic tank from the plaintiff's land.

The defendants' defences were firstly that the plaintiff had been aware of the encroachment of the house No. 75A and the siting of its septic tank since 1955 and this suit which was filed in 1977 had been time-barred under section 9(1) of the Limitation Ordinance 1953. Secondly, after the plaintiff became owner of the land he did nothing

about the encroachment for a long time although he was aware of it, and he acquiesced in the state of affairs that existed and was guilty of laches in not having taken action at the earliest possible opportunity and he was estopped from making this claim.

In counterclaim, the defendants asked for an order to compel the plaintiff to remove the extension of the garage, maintaining that the plaintiff had extended the garage in breach of the building by-laws requiring a statutory clearance of 20 feet to be maintained between the plaintiff's and the defendants' house.

Held: (1) the defendants' first ground of defence that the plaintiff's cause of action had been time-barred failed in view of section 341 of the National Land Code;

(2) acquiescence on the part of the plaintiff was not sufficient to create an easement. There must be an express grant of easement in accordance with the provisions of sections 282, 283, 284 and 286 of the National Land Code. In this case, there is no evidence that an express grant of easement was made at any time by the plaintiff in favour of the defendants;

(3) there is no statutory requirement that there must be a clearance of 20 feet between the plaintiff's and the defendants' house.

(4) the defendants should therefore, *inter alia*, forthwith cease from encroaching on to the plaintiff's land and resite their fencing in accordance with the boundary as shown in the title and the defendants should remove their septic tank from the plaintiff's land.

CIVIL SUIT.

T. Ariarajah for the plaintiff.
Miss G. Ambiavagar for the defendants.

Cur. Adv. Vult.

Wan Hamzah J.: The Plaintiff is the owner of land lot No. 179, Section 98, Kuala Lumpur Town on which there is a house No. 11. The Defendants are the owners of land lot No. 126, Section 98, Kuala Lumpur Town, which is adjoining to the Plaintiff's land lot No. 179. On the Defendants' land lot No. 126 there is a house No. 75A. A part of the Defendants' house No. 75A encroaches onto and is situated on the Plaintiff's land lot No. 179. The septic tank for the Defendants' house No. 75A is also situated on the Plaintiff's land lot No. 179. By this suit the Plaintiff asks for an order that the Defendants should remove that part of their house No. 75A as had been erected on the Plaintiff's land and that the Defendants should also remove their septic tank from the Plaintiff's land.

Evidence in this case is scanty. I give hereunder the facts of this case in chronological order, as far as can be gathered from the evidence. I also state hereunder the source of the evidence from which the facts are gathered:

1.1.1955	The house number 75A had just been completed and assessment in respect of the house was first levied on this date, vide Exhibit D10 and evidence of D.W.2.
22.4.1955	Certificate of title No. 15102 for lot No. *126* was issued in the name of Missy Alice Talalla (herein referred to as Madam Talalla) as representative of the estate of Hewage Sarnalis Talalla (deceased), vide Exhibit D11. Madam Talalla was the Plaintiff's mother.
13.6.1955	Madam Talalla as such representative transferred the land lot No. *126* to Loke Mooi, vide Exhibit D11.
10.7.1956	Loke Mooi transferred the land lot No. *126* to Chua Kung Siew, vide Exhibit D11.
20.8.1956	Madam Talalla transferred another piece of land, i.e. lot No. *127*, to the Plaintiff in consideration of love and affection, vide Exhibit D14B.
16.12.1957	Chua Kung Siew transferred the land lot No. *126* to Wang Teng Kiat, vide Exhibit D11.
1958	Madam Talalla passed away.
31.10.1961	Certificate of Title No. 21130 for lot No. *179* was issued to the Plaintiff, vide Exhibit D5.
27.7.1964	Wang Teng Kiat transferred the land lot No. *126* to Malayan Finance Corporation Ltd., vide Exhibit D11.
25.3.1971	The Plaintiff wrote to Malayan Finance Corporation Ltd. to say that he was constructing a house on his land lot No. *179* and that he noticed encroachment of house No. 75A on his lot and asked Malayan Finance Corporation Ltd. to remove its septic tank and other encroachment from his lot, vide Exhibit P2.
6.12.1972	Messrs. Shook Lin & Bok for Malayan Finance Corporation Ltd. wrote to Ketua Akitek Bandaraya Kuala Lumpur informing that it had discovered that its house No. 75A did not comply with the Town Board Enactment in that the minimum clearance between the house and the boundary line did not follow the statutory requirement, and that the reason was that subdivision of the land only took place subsequent to the building of the house, and the solicitors enquired whether it would be compelled to demolish, vide Exhibit D6.

23.2.1973 Bandaraya replied to Messrs. Shook Lin & Bok that it decided not to take any action in connection with the matter, vide Exhibit D7.

27.12.1974 Malayan Finance Corporation Ltd. entered into an agreement with the Defendants for the sale of its land lot No. *126* together with the house No. 75A to the Defendants at the price of $60,000. One of the terms was that the property was sold to the Defendants subject to the following encumbrances:–

(a) the encroachment of the boundary of the lot *126* upon the adjoining lot *179;*

(b) a portion of the house No. 75A was situated on the adjoining lot No. *179;*

(c) the septic tank for the house No. 75A was situated within the adjoining lot No. *179;*

(d) infringement of by-law 45(a) of the Kuala Lumpur Municipal (Building) By-laws, 1958 in that the siting of the house No. 75A from the boundaries of the lot No. *126* was less than 7 feet 6 inches.

The sale and purchase agreement was admitted in evidence and marked as Exhibit D8.

6.2.1975 Malayan Finance Corporation Ltd. transferred the land lot No. *126* together with the house No. 75A to the Defendants.

It was possible that at the time when house No. 75A was being built on lot No. *126* just before 1.1.1955 Madam Talalla as representative was the owner of both lot No. *126* and lot No. *127* and that part of the house No. 75A and its septic tank were built on lot No. *127.* It was also possible that after lot No. *127* was transferred by Madam Talalla to the Plaintiff it was subdivided into smaller lots, and that the subdivided portion of the lot No. *127* on which the encroaching part of the house No. 75A and its septic tank were situated was given lot No. 179. There is no evidence to establish these possibilities as real and true facts.

The Defendants put up two grounds of defence. The first ground is that the Plaintiff has been aware of the encroachment of house No. 75A and the siting of its septic tank since 1955 and therefore his cause of action arose in 1955 and this suit which was filed in 1977 had been time-barred under section 9(1) of the Limitation Ordinance 1953, which reads –

"No action shall be brought by any person to recover any land after the expiration of twelve years from the date on which the right of action accrued to him, or if it first accrued to some person through whom he claims, to that person."

In my judgment this ground of defence fails in view of section 341 of the National Land Code which provides as follows –

"Adverse possession of land for any length of time whatsoever shall not constitute a bar to the bringing of any action for the recovery thereof by the proprietor or any person or body entitled to an interest therein, and accordingly, the Limitation Ordinance 1953, shall in no circumstances operate to extinguish any title to, or interest in, land."

The second ground of defence is that after the Plaintiff became owner of the land (at that time lot No. 127 and now lot No. 179) he did nothing about the encroachment for a long time although he was aware of it, and he acquiesced in the state of affairs that existed and was guilty of laches in not having taken action at the earliest possible opportunity, and he is therefore estopped from making this claim. The Defendants' contention that the encroachment of part of their house into the Plaintiff's land cannot be disturbed and that they have the right to use the septic tank situated on the Plaintiff's land is tantamount to a claim for a right of easement for the benefit of their land lot No. 126 as the dominant land against the Plaintiff's land lot No. 179 as the servient land. The right which the Defendants seek to maintain is in the nature of an easement.

Sections 282, 283, 284 and 286 contained in Part 17 Chapter 1 of the National Land Code provide as follows:–

"282. (1) In this Act "easement" means any right granted by one proprietor to another, in his capacity as such and for the beneficial enjoyment of his land, in accordance with the following provisions of this Chapter.

(2) The rights capable of being granted as easements are those specified in section 283.

(3) The land for the benefit of which any easement is granted is in this Act referred to as "the dominant land", and the land of the proprietor by whom it is granted as "the servient land":

Provided that, where on the sub-division or partition of any land the benefit or burden of any easement ceases to be attached to, or binding upon, any portion, references in this Act to "the dominant land" or, as the case may be, "the servient land" shall thereafter be construed in relation to that easement as excluding the portion in question.

283. (1) The rights capable of being granted as easements are, subject to sub-section (2) –

(a) any right to do something in, over or upon the servient land; and

(b) any right that something should not be so done.

(2) The said rights do not include –

(a) any right to take anything from the servient land; or

(b) any right to the exclusive possession of any part thereof:

Provided that nothing in paragraph (b) shall prevent the existence as an easement of any right involving the placing and maintaining in or upon the servient land of any installations or other works.

284. (1) No right in the nature of an easement shall be capable of being acquired by prescription (that is to say, by any presumption of a grant from long and uninterrupted user).

(2) Except as mentioned in sub-section (3) of section 286, no such right shall be capable of being acquired by implied grant.

286. (1) The grant of any easement under this Chapter shall be effected by an instrument in Form 17A or, in the case of the grant by adjacent proprietors of cross-easements of support in respect of any party wall, by an instrument in Form 17B; and the easement shall come into existence on the date on which the instrument is registered.

(2) Any such grant may, so far as the interest of the grantor permits, be either in perpetuity or for any term of years.

(3) There shall be implied in every such grant the grant of all such ancillary rights as may be reasonably necessary for the full and effective enjoyment thereof.

(4) Any such grant may contain an agreement between the proprietors of the dominant and servient lands binding either or both to pay for, or contribute towards, the cost of constructing, maintaining or repairing any way, wall, drain or other installation or work forming the subject-matter of the easement.

(5) Any such agreement, and any agreement in a grant for the making of periodic payments by way of consideration therefor, shall be binding on the proprietor by whom it is entered into in respect only of the period during which his proprietorship continues to subsist, and, in respect of any subsequent period, shall be binding on his successor in title for the time being."

There is no evidence that an express grant of easement was made at any time by any proprietor of lot No. 179 in favour of lot No. 126 for siting or maintaining on lot No. 179 of any part of house No. 75A or its septic tank. To estop the Plaintiff from pursuing his claim in this suit would defeat the purpose of the above provisions of section 284 and the provisions of section 341 referred to above earlier. Acquiescence on the part of the Plaintiff is not sufficient to create easement. There must be an express grant of easement in accordance with the provisions of the above sections.

The National Land Code came into force in 1966. The question arises whether easement had been created under the law in force before the National Land Code, *i.e.* the Land Code, Chapter 138 of the Laws of the Federated Malay States. In that old Land Code there was no provision relating to creation of easement except right of way. Therefore in this case no easement could have been created before the National Land Code came into force.

In this suit there is a counterclaim by the Defendants. They allege that in breach of the building by-laws the Plaintiff extended the garage in his house so that the statutory clearance of 20 feet between the Plaintiff's house and the Defendants' house could not be maintained, and that this state of affairs poses a fire and health hazard to them. They ask for an order to compel the Plaintiff to remove the extension of the garage. There is no statutory requirement that there must be a clearance of 20 feet between two houses on different lots. The statutory requirement is that there must be clearance of the minimum of 7½ feet from a house on a lot from the boundary of that lot and a clearance of 15 feet between two houses, vide Kuala Lumpur Municipal (Building) By-laws 1958, paragraph 45. Haji Hamzah bin Hashim, Chief Building Surveyor, Building Control Division, Bandaraya Kuala Lumpur, gave evidence in this case. He testified that his departmental plan shows extension of the Plaintiff's porch and the extension was approved in 1971. He testified further that the plan shows the statutory clearance of 7½ feet from the Plaintiff's house to the boundary of lot No. 179. Therefore I dismiss the Defendants' counterclaim, with cost to the Plaintiff.

I give judgment for the Plaintiff and order as follows:–

(i) that the Defendants should forthwith cease from encroaching onto the Plaintiff's land and resite their fencing in accordance with the boundary as shown in the title;

(ii) that the Defendants should remove their septic tank from the Plaintiff's land;

(iii) that the Defendants should refrain whether by themselves or their servants or agents or otherwise from doing the following acts or any of them that is to say erecting or re-erecting buildings on their land in such a manner as to encroach onto the Plaintiff's land.

I further order that the Defendants should pay to the Plaintiff the cost on his claim.

Claim allowed.
Counterclaim dismissed.

Solicitors: *T. Ariarajah & Co.; Ambiavagar & Co.*

ROY R. MUTTIAH v. HAJI MOHAMED ZUKI & ANOR.

[O.C.J. (Shaik Daud J.), December 30, 1983]
[Kuantan – Civil Suit No. 254 of 1982]

Legal Profession – Solicitors – Dispute between solicitors – Defendants withholding documents – Whether reasonable – Order for delivery.

The plaintiff applied for an order for the delivery of certain documents (land titles and transfers) by the defendants. He deposed that at all times since June 1977 he had been the partner of the defendants holding 70% shares of the partnership of Zuki Gandhi & Amin, Temerloh & Mentakab offices. When he returned from holidays abroad in September 1982, he was denied entry to the two offices and the defendants took possession of every article therein, including personal articles. He also deposed that they took possession of land Grant No. 5191 for land which he personally purchased. Just before leaving for his holidays, the plaintiff had in turn sold this piece of land to certain purchasers and a transfer was executed after which he left instructions with his staff to proceed with the necessary acts of transfer. The second defendant took possession of the title and transfers. The defendants also took possession of land title GM 209 for land in respect of which the plaintiff acted as solicitor in its sale and purchase.

The defendants opposed the handing over of the documents. They contended that, in respect of Grant No. 5191, a probable offence under the Penal Code was alleged to have been committed by the plaintiff when he was a partner of the defendant firm and the relevant documents might be required by the police in their investigation. As regards GM 209, the defendants contended that the plaintiff had no *locus standi.*

Held, allowing the application: (1) on Grant 5191, the reason given by the defendants was untenable and weak. It was not really necessary for the police to get hold of the original documents for the purpose of their investigation as photostat copies of the documents would have sufficed until the criminal matter is tried in court;

(2) on GM 209, by handing over the documents, the position of the defendants would in no way be affected. On the other hand, the unreasonable refusal by the defendants had affected the rights of third parties;

(3) in the event, the defendants had acted unreasonably and in bad faith and were directed to hand over all the documents concerned to the plaintiff's solicitor within 7 days from service of the order.

SUMMONS-IN-CHAMBERS.

Mahinder Singh for the plaintiff.
S. Subramanian for the defendants.

Cur. Adv. Vult.

Shaik Daud J.: The plaintiff filed this Summons-in-Chambers for an order that:–

1. The defendants forthwith deliver the title to the land held under Grant No. 5191 Lot 27 Section 7 Bandar Mentakab to the Plaintiff.

2. The Defendants do forthwith deliver the Memorandum of Transfers of the land held under Grant No. 5191 Lot 27 Section 7 Bandar Mentakab from R. Sethu to the Plaintiff and from the Plaintiff to Pandurangen and 9 others to the Plaintiff.

3. The defendants do forthwith deliver the title to the land held under GM 209 Lot 1510 Mukim of Pedah to the Plaintiff.

4. The Defendants do forthwith deliver the Memorandum of Transfer of the land held under GM 209 Lot 1510 Mukim of Pedah from Tan Khai Mun to Messrs Lean Wah Sdn. Bhd.

5. The defendants do forthwith deliver the Bank Statement, cheque butts, vouchers, disbursements records, ledgers, cash books and such other necessary records as and when requested of the Temerloh and Mentakab offices of Messrs Zuki Gandhi & Amin in respect of the office and clients account for the years 1981 and 1982.

This application is supported by the affidavit of the plaintiff, Mr. Roy R. Muttiah, who deposed that at all times since June 1977 he had been the partner of the defendants holding 70% shares of the partnership of Messrs Zuki Gandhi & Amin, Temerloh & Mentakab offices. Upon his return from holidays abroad in September 1982 the plaintiff found himself being denied entry